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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

JAMES S. GORDON, JR., an individual residing in Benton County, Washington, Plaintiffs vs. IMPULSE MARKETING GROUP, INC., a Nevada Corporation, Defendants	NO. CV-04-5125-FVS DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO RESCHEDULE OR STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
IMPULSE MARKETING GROUP, INC., Third-Party Plaintiff, vs. BONNIE GORDON, JAMES S. GORDON, III, JONATHAN GORDON, JAMILA GORDON, ROBERT PRITCHETT and EMILY ABBEY, Third-Party Defendants.	

The Summary Judgment now scheduled for hearing November 2, 2005, commenced as a Motion to Dismiss and in the Alternative for Summary Judgment. Plaintiff did not file a LR56.1 Statement of Material Fact with Plaintiff's Motion. Rather, Plaintiff filed a LR56.1 Statement with Plaintiff's Reply thereby prompting Defendant's motion for authority to file Defendant's LR56.1 Statement

Defendant's Motion to Shorten Time for Consideration of Defendant's Motion to Strike Plaintiff's Motion to Dismiss or for Clarification - 1.
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of Disputed Facts. Defendant filed its LR56.1 Statement of Disputed Facts on Friday, October 14, 2005. Consideration of Plaintiff's LR56.1 Statement of Material Fact led Defendant to the realization that Defendant lacks a basis to respond to eleven of the twenty-six "Facts" asserted by Plaintiff to be Material Facts.

The normal course of litigation provides for Discovery followed by the filing of dispositive motions. Plaintiff's early motion, converted to a Motion for Summary Judgment, predates any discovery. Several "Material Facts" asserted by Plaintiff are allegations from Plaintiff's Complaint. The Defendant is without the ability to do more than reassert the denial found in Defendant's Answer.

Defendant requests the Rescheduling or Striking of Plaintiff's Motion for Summary Judgment until the completion of Discovery. Defendant's Motion is in recognition and apprehension of possible waiver by Defendant wherein Facts deemed to be Material Facts by the Plaintiff, being unrefuted regardless of the reason, may be taken by the Court to be the facts on which the Court will rule. Defendant notes holdings relative to similar issues as follows: *USA Petroleum Co. v. Atlantic Richfield Co.* 13 F.3d 1276, 1284 (9th Cir. Cal. 1994) at Footnote 13 where a party asserted a legal theory but failed to pursue it adequately it was held that the opportunity had been granted; *Han v. Mobil Oil Corp.* 73 F.3d 872, 876 (9th Cir. Cal. 1995) where affirmative defenses realized during discovery may be raised for the first time on a motion for summary judgment; *Allen v. Scribner* 812 F.2d 426, 435 (9th Cir. Cal. 1987) at footnote 18 holds that a party failing to move to strike an affidavit that is defective under Rule 56(e) waives any objection to the afficavit.

Discovery will allow the Defendant to properly assemble and test the evidence and then determine the existence of evidence which will indeed dispute

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Material Facts. Defendant requests that the Summary Judgment await the conclusion of discovery.

DATED this 18th day of October, 2005.

LIEBLER, IVEY, CONNOR, BERRY & ST. HILAIRE

By /s/ FLOYD E. IVEY
FLOYD E. IVEY, WSBA #6888
Local Counsel for Defendant

I hereby certify that on October 18, 2005, I electronically filed DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO RESCHEDULE OR STRIKE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF System which will send notification of such filing to Douglas E. McKinley, Jr., Peter J. Glantz and Sean A. Moynihan. I hereby certify that I have served the foregoing to the following non-CM/ECF participants by other means: Bonnie Gordon, Jonathan Gordon, James S. Gordon, III and Robert Prichett. I hereby certify that I have served the foregoing to the following persons who are non-CM/ECF participants named in this lawsuit, but who have not yet been served or entered an appearance in this lawsuit by other means: Emily Abbey and Jamila Gordon.

S/ FLOYD E. IVEY
FLOYD E. IVEY

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